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No. 74-1219

In the Supreme Court of the United States

OCTOBER TERM, 1974

MODERN ASPHALT PAVING AND CONSTRUCTION CO.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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Petitioner contends that the price-fixing conspiracy of which it was convicted did not sufficiently affect interstate commerce to constitute a violation of Section 1 of the Sherman Act.

Petitioner and a co-defendant, Finis P. Ernest, Inc. (Ernest),[1] were found guilty by a jury on a one-count indictment alleging a combination and conspiracy to submit collusive bids to the City of East St. Louis, Illinois, for the construction of a sanitary sewer project. The court fined Ernest $35,000 and petitioner $15,000. The court of appeals affirmed, rejecting, among other arguments, the claim that the evidence at trial was insufficient to establish jurisdiction under the Sherman Act (Pet. App. A-1 to A-13).

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[1]Ernest is not a participant in this petition.

The evidence showed that in August 1971, two months after the city had rejected a bid from Ernest—the sole bid—as too far above the engineer's estimate, petitioner and Ernest submitted virtually identical bids on a sewer project to be financed with funds provided by the United States Department of Housing and Urban Development ("HUD"). In October 1971 the city requested an additional $300,000 from HUD for the project; in February 1972 the request was granted (Pet. App. A-3). Ernest's successful bid was $260,180.78 (Pet. 5).

Materials manufactured outside the State of Illinois were used in construction of the project. Clay sewer pipe made in Indiana and manhole frames and covers made in Wisconsin were purchased from an Illinois company. A sewer pumping station was purchased from a Georgia manufacturer. The cost of the materials purchased from outside of Illinois was $9,307 (Pet. App. A-3).

In affirming the convictions the court of appeals discussed what it considered to be two different approaches taken by the courts in "determining whether particular circumstances constitute a 'restraint of trade or commerce among the several states'" (*ibid.*). One approach, said the court, allowed the elements of "restraint" and "interstate commerce" to be satisfied separately (*id.* at A-3 to A-5). The other, said the court, "considers the nexus between restraint and interstate commerce * * *" (*id.* at A-5).

The court found it unnecessary to choose between the two approaches it perceived, however, since the evidence was sufficient "to support a finding of jurisdiction under either" (*id.* at A-8).

Petitioner urges that certiorari be granted because this Court has never decided, and the courts of appeals are in conflict over, the question whether jurisdiction under

the Sherman Act extends to "a wholly local conspiracy to restrain intrastate commerce even though there is no restraining effect on interstate commerce" (Pet. 9). This question was not decided below, however, because the court of appeals concluded that petitioner's conduct did indeed restrain interstate commerce. Furthermore, no conflict among the circuits exists since none of the decisions cited by petitioner or the court of appeals below sustained jurisdiction when the defendant's conduct had "no restraining effect on interstate commerce."

The only issue actually presented, therefore, is whether the evidence was sufficient to show a restraint of interstate commerce. The court of appeals correctly held that it was and further review of this evidentiary question is unwarranted.

1. The court of appeals did not, as petitioner suggests (*id.* at 11, 13), affirm petitioner's conviction although finding "no restraining effect on interstate commerce" (*id.* at 9). On the contrary, it specifically stated that "If * * * proof of a restraint of interstate commerce is required for jurisdictional purposes, there are sufficient facts to warrant such a finding" (Pet. App. A-8).

2. There is no conflict between the decision below and any of the decisions discussed therein or cited by petitioner. After discussing what it considered to be two different "responses to the question of whether Sherman Act jurisdiction requires proof of a restraint on interstate commerce" (*ibid.*), the court of appeals said that it need not choose between the approaches it perceived because it was "convinced that there is sufficient evidence in this case to support a finding of jurisdiction under either approach" (*ibid.*). Petitioner is thus incorrect in asserting that the court below "adopted a view in direct opposition and in contradiction to" the Ninth, Fifth, Second, and Eighth

Circuits (Pet. 15). As petitioner notes, in those cases "there was no showing that the restraint operated on the interstate commerce" (*ibid.*; emphasis deleted); here, to the contrary, the court specifically held that petitioner's anticompetitive activity did operate on interstate commerce.

Furthermore, all of the decisions cited by the court below or by petitioner can be reconciled: each inquires into the effect of the local anticompetitive conduct on interstate commerce, and none finds a violation of the Sherman Act where the local conduct had no impact on interstate commerce.[2]

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[2]In *Page* v. *Work*, 290 F.2d 323, 332 (C.A. 9), *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341, 343 (C.A. 9), *Rosemound Sand & Gravel Co.* v. *Lambert Sand & Gravel Co.*, 469 F.2d 416, 418 (C.A. 5), *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269, 272 (C.A. 2), *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167, 170 (C.A. 8), and *Saint Anthony-Minneapolis, Inc.* v. *Red Owl Stores, Inc.*, 316 F. Supp. 1045, 1048 (D. Minn.), the courts said that the test was whether the effect of local anticompetitive conduct on interstate commerce was "direct and substantial" (sometimes phrased simply "substantial"). In each case judgment was for the defendant because the effect of the local conduct on interstate commerce was nonexistent or insubstantial.

The other cases cited by the court of appeals and petitioner are consistent. In *Rasmussen* v. *American Dairy Ass'n*, 472 F.2d 517, 526-528, *Gough* v. *Rossmoor Corp.*, 487 F.2d 373, 376, and *Ford Wholesale Co., Inc.* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1204, 1205, the Ninth Circuit cited *Page, supra*, for the test stated above. In *Rasmussen* and *Gough* the defendants' local anticompetitive conduct was found to have had a substantial effect on interstate commerce; in *Ford* it was not. The rationale behind each decision was the same as in the cases above. In *In re Western Liquid Asphalt Cases*, 487 F.2d 202 (C.A. 9), reversed on other grounds *sub nom. Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, the court found that the defendants' close relationship with an instrumentality of interstate commerce served to place their activities "in" commerce; that is, their activities were an integral part of interstate commerce, and there was thus no need to consider the impact of intrastate conduct.

Similarly, *United States* v. *Bensinger Co.*, 430 F.2d 584 (C.A. 8), involved an interstate, not an intrastate, conspiracy.

3. The court of appeals correctly ruled that there was sufficient evidence that petitioner's anticompetitive conduct had an impact on interstate commerce to sustain jurisdiction under the Act.

Bid-rigging conspiracies inevitably eliminate or reduce competition among the participants. "When competition is reduced, prices increase and unit sales decrease." *Burke* v. *Ford*, 389 U.S. 320, 322. Here the court of appeals ruled that, notwithstanding that the suppliers charged their standard prices for the out-of-state materials, defendants' bid-rigging eliminated the incentive to obtain competitive prices from other out-of-state materials suppliers and thereby restrained interstate commerce in clay sewer pipe, manhole frames and covers, and a sewer pumping station.[3]

The court also noted evidence that the defendants' bid-rigging increased the cost of the sewer project to the city. As the court then pointed out, "[W]here the city must use more of its available funds to complete the sewer project it will have less money to expend for other projects requiring the use of goods shipped in interstate commerce" (Pet. App. A-9). Thus in this respect also petitioner's conduct adversely affected interstate commerce. See *Burke* v. *Ford, supra*; *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S. 211, 241-246.

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[3]Petitioner contends (Pet. 13) that there is not "a scintilla of evidence" that the bid-rigging "had the slightest effect upon the prices charged" by the suppliers of interstate goods employed in the project. The impact on interstate commerce is measured not by the conspiracy's effect on the price of material charged by out-of-state suppliers, however, but by the effect on the price of this material in its interstate flow from manufacturer to the ultimate consumer—the City of East St. Louis. See *Northern California Pharmaceutical Ass'n* v. *United States*, 306 F.2d 379, 386-387 (C.A. 9), certiorari denied, 371 U.S. 862.

The court also ruled that the increased cost of the project to the city resulted in an increased draw on HUD funds, which move in interstate commerce, which in turn resulted in a diminution of federal money available for projects elsewhere in the country. Anticompetitive conduct interfering with the flow of these funds can be reached by the prohibitions of the Sherman Act, for there Congress "wanted to go to the utmost extent of its Constitutional power," *United States* v. *Southeastern Underwriters Ass'n*, 322 U.S. 533, 558, and "exercised all the power it possessed." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495. Similarly, although the amount of money involved in the purchase of the out-of-state materials was not large, it was enough to bring the conspiracy under the Act. Cf. *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, where this Court applied the Fair Labor Standards Act, a statute in which Congress did not exercise fully its power over commerce, *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, to a newspaper only ½ of 1 percent of whose circulation was out of state.

In sum, the court of appeals correctly held that petitioner's bid-rigging had a sufficient impact on interstate commerce to violate the Sherman Act.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.